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Supreme Court, U.S.
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No. 03-47

In the Supreme Court of the United States

FRANK D. GILLIS, ET AL.,
Petitioners

v.

JOHN HOLLAWELL, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the internal policies and practices of a parole agency, which do not bind that agency and may be changed or disregarded whenever it wishes, are "laws" which may not be altered without triggering the protections of the Ex Post Facto Clause?

2. Whether a change to the "aspirational introductory provision" of a parole statute, which leaves the parole board, as before, with virtually unreviewable discretion to grant or deny parole, violates the Ex Post Facto Clause by increasing the punishment for previously committed offenses?

PARTIES TO THE PROCEEDING

This petition seeks review of two judgments, involving identical or closely related questions, on a writ of certiorari to the same court. *See* Sup. Ct. R. 12.4. The two judgments were entered, respectively, in *Hollawell v. Gillis, et al.*, No. 01-1063 (3d Cir.), and in *Mickens-Thomas v. Vaughn, et al.*, No. 02-2047 (3d Cir.).

In the *Hollawell* case, the petitioners are Frank D. Gillis, the Superintendent of the State Correctional Institution at Coal Township, Pennsylvania; and Benjamin A. Martinez, the Acting Chairman of the Pennsylvania Board of Probation and Parole.[1] The respondent is John Hollawell.

In the *Mickens-Thomas* case, the petitioner is the Pennsylvania Board of Probation and Parole. The respondent is Louis Mickens-Thomas.

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[1]Mr. Martinez has been substituted for William Ward, his predecessor in office, pursuant to Sup. Ct. R. 35.3.

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OPINIONS BELOW

The decisions in *Hollawell v. Gillis* are not reported. The decision of the Court of Appeals is reprinted in the appendix to this petition ("Pet. App.") at 1a; and the decision of the District Court is reprinted at Pet. App. 17a.

The decision of the Court of Appeals in *Mickens-Thomas v. Vaughn* is reported at 321 F.3d 374 and is reprinted at Pet. App. 23a. The decision of the District Court is reported at 217 F.Supp.2d 570 and is reprinted at Pet. App. 61a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals in *Hollawell v. Gillis* was entered on April 23, 2003, Pet. App. 2a, and this petition is being filed within 90 days thereafter.

The judgment in *Mickens-Thomas v. Vaughn* was entered on February 21, 2003. Pet. App. 24a. A petition for rehearing was timely filed, and was denied on March 24, 2003. Pet. App. 82a. This petition is being filed within 90 days thereafter.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 10, clause 1 of the United States Constitution provides in relevant part that "[n]o State shall ... pass any *ex post facto* law...."

2. Section 331.1 of the Pennsylvania Probation and Parole Act, as amended in 1996, provides as follows:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
>
> In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public. In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

Pa. Stat. Ann., tit. 61, § 331.1 (Purdon 1999), *as amended by* Act of December 18, 1996, P.L. 1098, No. 164, § 1.

3. Before its amendment in 1996, Section 331.1 provided as follows:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject or sentenced to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment, and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration, and to that end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

Act of August 6, 1941, P.L. 861, § 1, *previously codified at* Pa. Stat. Ann., tit. 61, § 331.1 (Purdon).

STATEMENT OF THE CASE

These cases are habeas corpus actions brought by state prisoners challenging the denial of parole, and arise out of a 1996 amendment to Pennsylvania's parole statute. In upholding their challenge, the Court of Appeals, unlike other courts which have considered similar issues, first held that the internal policies of Pennsylvania's Parole Board are "laws" which cannot be changed without implicating the Ex Post Facto Clause. The Court of Appeals then held that the amendment to the parole statute had worked such a change, giving no weight to decisions of the Pennsylvania courts, including the highest court of the Commonwealth, which rejected similar claims and held that the amendment introduced "nothing new" to the parole process.

1. a. Parole in Pennsylvania is governed by the Probation and Parole Act, Pa. Stat. Ann., tit. 61, §§ 331.1 through 331.34a (Purdon 1999) ("Parole Act"). Enacted in 1941, the Parole Act establishes the Board of Probation and Parole, which among other things has the "exclusive power to parole and reparole" all persons sentenced to two years or more of imprisonment. *Id.*, § 331.17.

Prisoners are not eligible for parole until they have served their minimum sentence. *Id.*, § 331.21(a). In deciding whether to grant a parole, the Board is to inform itself of the prisoner's complete criminal record, conduct while in prison, and "physical, mental and behavior condition and history"; and the Board is to consider "the nature and circumstances of the offense committed," any recommendations of the trial judge and prosecutor, and "the general character and background of the prisoner." *Id.*, § 331.19. In addition, a member or designee of the Board must have "seen and heard" the prisoner "in person" before granting or denying parole. *Id.*, § 331.22.

But within these limits, the Act confers unfettered discretion upon the Board. The Board, "in [its] discretion," may release on parole any prisoner "whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby." *Id.*, § 331.21. Thus, "the granting of parole is wholly discretionary" with the Board. *Coady v. Vaughn*, 564 Pa. 604, 608, 770 A.2d 287, 290 (2001); "a prisoner has only a right to apply for parole ... and to have that application considered by the Board." *Rogers v. Bd. of Probation and Parole*, 555 Pa. 285, 288, n.2, 724 A.2d 319, 321 n.2 (1999).

Since the legislature "has conferred upon the Parole Board *sole* discretion" to grant or deny paroles, *Rogers*, 555 Pa. at 291, 724 A.2d at 322 (emphasis added), the grant or denial of parole is not ordinarily subject to judicial review. While the Pennsylvania courts will entertain an action in mandamus to compel the Board to exercise its discretion, *see, e.g., Marshall v. Bd. of Probation and Parole*, 638 A.2d 451 (Pa.Cmwlth. 1994), or to assert a *constitutional* challenge to the denial of parole, *Coady v. Vaughn, supra* (claim of ex post facto violation may be addressed in mandamus action), the decisions of the Board are not otherwise reviewable by the courts. *Rogers v. Bd. of Probation and Parole, supra.*

Nor has the Board adopted administrative regulations governing the grant or denial of parole. Under Pennsylvania law, the promulgation of such regulations is governed by a statutory rulemaking process[2];

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[2]*See* the Commonwealth Documents Law, Pa. Stat. Ann. tit. 45, §§ 1102 *et seq.* (Purdon 1991), and the Regulatory Review Act, Pa. Stat. Ann. tit. 71, §§ 745.1 *et seq.* (Purdon (continued...)

regulations thus adopted, if they are substantive rules, have the force and effect of law and bind the adopting agency, while other agency directives do not. *See, e.g., Lopata v. Pa. Unemployment Compensation Bd. of Review*, 507 Pa. 570, 575-76, 493 A.2d 657 (1985). Pursuant to this process, the Board has adopted regulations on a variety of subjects, but not on the substantive criteria for parole decisions. *See generally* Pa. Code, tit. 37, Pt. II.

The Board has, however, developed internal guidelines to aid its decision-making. The "Parole Decision Making Guidelines" structure the Board's decision-making process, but they neither eliminate nor control the Board's discretion in deciding cases; rather, they were designed to reflect the Board's decision-making practices. The Guidelines attempt to judge the likelihood of a successful parole by assigning numerical values to a number of criteria, thought to be of value in predicting the likelihood of recidivism and the potential for violent behavior. The total score thus produced provides a recommendation for or against parole. *See* Pet. App. 30a. This score, however, does not end the process; it "is intended to guide the decision-maker but not dictate the decision." Pet. App. 86a. The Guidelines allow for the consideration of countervailing factors which, in the judgment of the decision-maker, may outweigh the numerical score; the Guidelines form lists some of the most common such factors,[3] but does not purport to be exhaustive. The final decision on parole remains in the

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[2](...continued)
1990).

[3]For example, a history of participation in institutional programs might outweigh a negative recommendation from the numerical score. Similarly, unfavorable recommendations from the Department of Corrections, sentencing judge or prosecutors might outweigh a positive recommendation.

hands of the Board; as the Board's 1990 "Statement on Policy, Procedure and Philosophy" notes, "the structuring of discretion does not eliminate it; the burden of decision remains with the decision maker to evaluate the merits of each case." Pet. App. 84a, *quoted at* Pet. App. 31a.

The information in the record, although dated, indicates that as of 1989 the Board's ultimate decision departed from the Guidelines recommendation in about 20% of the cases. Pet. App. 31a, 86a-87a. In addition, the Guidelines, which were first developed in 1980, have themselves been modified several times over the years to better reflect the Board's actual decision-making practices. *See* Pet. App. 84a (Board's "Statement on Policy, Procedure and Philosophy").

b. In the aftermath of a 1989 prison riot, the Board began pursuing a deliberate policy of "reduction in prison overcrowding through the parole process," and began granting nearly 80% of parole applications. Pet. App. 33a, 83a-84a.[4] In 1994 and 1995, however, two Pennsylvania prisoners committed murders, including the murder of a New Jersey police officer, while on parole. Pet. App. 32a & n.9; *see State v. Simon*, 161 N.J. 416, 737 A.2d 1 (1999). In the aftermath of these crimes, investigations by Pennsylvania's Inspector General and the Chairman of the State Senate Judiciary Committee recommended that Pennsylvania's corrections philosophy should place more emphasis on public safety, and that existing statutes and policies should be changed accordingly. *See* Pet. App. 32a-33a.

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[4]Similar statistics appear in the Pennsylvania Department of Corrections' *2000 Annual Statistical Report*, p. 45, available at http://www.cor.state.pa.us/info (visited May 22, 2003).

Over the next several years, the Pennsylvania legislature enacted or amended a number of statutes relating to parole, including the Parole Act itself.[5] Most relevant to these cases, in December of 1996, the legislature amended Section 331.1 of the Parole Act, Pa. Stat. Ann., tit. 61 § 331.1 (Purdon 1999). Section 331.1 is, as the Court of Appeals said, a "preface to the comprehensive set of rules governing parole in Pennsylvania." Pet. App. 28a n.5. As amended, Section 331.1 recounts the benefits of the parole system, "including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison." It then provides that in providing these benefits, "the

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[5]These included provisions authorizing parole agents to search parolees and their property, *see* Pa. Stat. Ann., tit. 61, § 331.27a (Purdon 1999), *added by* Act of Nov. 17, 1995, P.L. 1339 (Spec. Sess. No. 1), No. 35; authorizing electronic monitoring of parolees and the establishment of intensive supervision units, *see* Pa. Stat. Ann., tit. 61, § 331.16b(a)(10)-(11), *added by* Act of Nov. 17, 1995, P.L. 1145 (Spec. Sess. No. 1), No. 37; expanding the Board from five members to nine, *see* Pa. Stat. Ann., tit. 61, § 331.2 (Purdon 1999), *amended by* Act of Dec. 18, 1996, P.L. 1098, No. 164; permitting crime victims to petition the Board to deny a parole application, *see* Pa. Stat. Ann., tit. 18, § 11.502 (Purdon 2000), *added by* Act of Nov. 24, 1998, P.L. 882, No. 111; requiring, as a condition of eligibility for parole, that prisoners convicted of crimes of violence participate in a crime impact education program, *see* Pa. Stat. Ann., tit. 61, § 331.21(b.1) (Purdon 1999), *added by* Act of Dec. 21, 1998, P.L. 1077, No. 143; and permitting the immediate detention of parolees charged with offenses, *see* Pa. Stat. Ann., tit. 61, §§ 331.21(a) and 331.21a(a.1), *amended by* Act of Dec. 21, 1998, P.L. 1077, No. 143.

[B]oard shall first and foremost seek to protect the safety of the public."[6]

This amendment, to what the Court of Appeals called the "aspirational introductory" provision to the Parole Act, Pet. App. 27a, did not alter the conditions of eligibility for parole, *see id.*, § 331.21, nor did it alter the matters which the Board was required to consider in deciding parole applications, *see id.*, § 331.19, nor did it alter the Board's authority to grant parole "in [its] discretion." *Id.*, § 331.21. Nevertheless, the amendment to Section 331.1, and in particular the exhortation to the Board to consider the public safety "first and foremost," is the only statutory change alleged to have affected the parole decisions challenged in these cases.

In the meantime, the Board had likewise acted. By February of 1996, the Chairman of the Judiciary Committee reported that the Board had "set out to establish public safety as a priority including a more careful review of parole eligible cases...." *See* Pet. App. 33a. Although the Board did not change its Guidelines at this time, the rate at which the Board granted paroles dropped dramatically, from 77% in the years immediately after the 1989 prison riot, to 38% in the fiscal year ending in June of 1996. Pet. App. 83a-84a (Board's Biennial Reports); *see* Pet. App. 33a.[7]

These events occurred well before Section 331.1 was amended in December of 1996. After the statute was

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[6]The complete text of Section 331.1, before and after its amendment, is reprinted above at 1-2.

[7]*See also* PA. DEPT. OF CORRECTIONS, *2000 Annual Statistical Report*, p. 45, available at http://www.cor.state.pa.us/info (visited May 22, 2003).

amended, the rate at which the Board granted paroles actually rose slightly, to 42% in the calendar year ending in June of 1997.[8] Pet. App. 84a. (Board's 1995-97 Biennial Report). At some point between 1998 and 2000, the Board also revised its Guidelines to bring them into line with its actual practices. *See* Pet. App. 44a, 53a n.16, 84a (Board's Statement on Policy, Philosophy and Procedure)(policy should reflect decision-making practice).

Against this background are the two cases presented in this petition.

2. *Mickens-Thomas v. Vaughn.* a. In 1964, Louis Mickens-Thomas raped and strangled twelve-year old Edith Connor. Pet. App. 26a, 61a-62a. He was convicted of first-degree murder and sentenced to life without the possibility of parole. *See* Pet. App. 26a, 62a; *Comm. v. Thomas*, 448 Pa. 42, 292 A.2d 352 (1972). In 1995, on the recommendation of the Commonwealth's Board of Pardons,[9] the Governor of Pennsylvania commuted Mickens-Thomas' sentence to a minimum term of about 32 years, making him eligible for parole in July of 1996. Pet. App. 64a-65a.

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[8]That rate has continued to rise. *See* PA. DEPT. OF CORRECTIONS, *2000 Annual Statistical Report, supra* at p. 45 (parole grants rose from 38.8% in calendar year 1996, to 49.8% in 2000).

[9]The Board of Pardons is an agency separate from the Board of Probation and Parole. *See* Pet. App. 63a n.1, *quoting* PA. CONST., art. 4, § 9.

A panel of the Board considered Mickens-Thomas' parole application in August of 1997.[10] The Board denied his application, citing the brutal nature of his crime, his prior history of assault, the unfavorable recommendation of the District Attorney, and his "very high potential" for assaultive behavior. At his next review, in March of 1998, a second panel denied his application for much the same reasons, citing in addition his need for counseling and treatment.[11] On both occasions, the Board of Pardons concurred with the Parole Board's decision.[12] Pet. App. 34a-37a, 66a-68a. While Mickens-Thomas' habeas petition was pending in the District Court, the Board denied his parole application a third time, in March of 2000. Pet. App. 68a.

b. After exhausting his state court remedies, Pet. App. 25a n.1, Mickens-Thomas brought this habeas action pursuant to 28 U.S.C. § 2254(a). He claimed that "the retroactive application of changes in rules, guidelines,

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[10]Initially, the Board declined to consider Mickens-Thomas' application on its merits, on the ground that he had not spent the requisite time in a pre-release center, as required by Section 331.34a of the Parole Act. The Board later conceded, however, that this provision, which was not included in the Act until 1995, could not constitutionally be applied to Mickens-Thomas. Pet. App. 65a-67a; *see Mickens-Thomas v. Bd. of Probation and Parole*, 699 A.2d 792 (Pa.Cmwlth. 1997).

[11]Mickens-Thomas has consistently refused to accept responsibility for his crime. His only participation in sex offender therapy has been in a limited program for "deniers" like himself. Pet. App. 26a, 36a.

[12]Under the law in effect at the time Mickens-Thomas committed his offense, the Board of Pardons may overrule the Parole Board's decision and order his immediate parole. *See* Pa. Stat. Ann., tit. 61, § 331.21, historical note (Purdon 1999).

policies or statutes" to deny his parole violated the Ex Post Facto Clause.[13] Pet. App. 71a-72a.

The District Court agreed. The District Court looked first to the December 1996 amendment to Section 331.1 of the Parole Act, particularly the provision that the Board "shall first and foremost seek to protect the safety of the public." Pet. App. 74a. The District Court then looked to a variety of other materials — the Board's statement, drawn from its 1995-1997 biennial report, that the Board "is committed to protecting the safety of the public," Pet. App. 74a; evidence that, before 1995, the Board had historically paroled other life prisoners whose sentence had been commuted, Pet. App. 69a, 77a; and statistical evidence showing that parole releases had dropped dramatically between 1991 and the first quarter of 1996. Pet. App. 73a-74a. From this, the District Court concluded that "[i]t seems clear that the Board has adopted the policy change made in the [December] 1996 amendment."

The District Court thus reasoned that the "practical application," Pet. App. 76a, of the December 1996 amendment had "increased to a significant degree the likelihood that petitioner will be in jail longer than if the pre-1996 policy would have been followed." Pet. App. 77a. The District Court ordered the Board to re-hear Mickens-Thomas' parole application "under the standards that existed prior to the amendment to [of] the Probation and Parole Act." Pet. App. 80a. The District Court did not discuss what those "standards" were, or how they differed

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[13]He claimed also that he had a "reasonable and objective expectation," Pet. App. 77a, amounting to a liberty interest, in being paroled, and that the Board's refusal to do so deprived him of both procedural and substantive due process. The District Court rejected this claim, Pet. App. 77a-79a, and it is not before the Court in this petition.

from the standards which the Board had applied to Mickens-Thomas' applications.

c. The Board appealed, but the Court of Appeals affirmed the District Court's decision.[14] The Court of Appeals turned first to the law governing parole before the December 1996 amendment to Section 331.1. To ascertain that law, the Court of Appeals looked, not to the "comprehensive set of rules," Pet. App. 28a n.5, contained in the Parole Act, but rather to the Board's internal forms, manuals and reports, especially the Parole Guidelines and materials relating to them.[15] *See* Pet. App. 29a-32a. The Court of Appeals also relied heavily on the Board's historical practice of granting parole to life prisoners whose sentence had been commuted. Pet. App. 44a, 69a.

Based on these materials, the Court of Appeals concluded that "the Board has, by both its past decisions to grant parole for commuted sentences, and by its formal declarations of policy, expounded discernible parameters that govern its discretion." Pet. App. 46a. The Court of Appeals distilled those "parameters" as follows:

> [P]re-1996 policies ... commanded that the Board give weight to various factors in the parole process, such

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[14]Mickens-Thomas cross-appealed from the District Court's denial of his due process claim, but the Court of Appeals affirmed the District Court's decision in this respect as well. Pet. App. 25a, 59a.

[15]The Court of Appeals cited, for example, the Board's 1989 Manual of Operations, Pet. App. 29a; a 1990 paper entitled "Parole Decision Making Guidelines: A Statement on Policy Procedure and Philosophy," Pet. App. 30a; and a 1991 report on the Guidelines prepared for the Pennsylvania House Judiciary Committee. Pet. App. 30a.

> as Department of Corrections staff recommendations, educational accomplishments, job training, and therapy programs. ... [R]elease upon eligibility for parole was presumed, and any decision to deny parole based on public safety considerations had to be supported by specific reasons, which outweighed those factors favoring release. ... [T]he Board's concern for potential risks to public safety could not be the sole or dominant basis for parole denial under the existing Guidelines. Considerations of public safety were already incorporated in its Guidelines analysis; the Board had to point to "unique" factors as a basis for its rejection of the Guidelines.

Pet. App. 44a-45a. While "some discretion might still exist within the[se] parameters," a parole decision which failed to adhere to them "falls outside the realm of the legitimate exercise of discretion." Pet. App. 47a.

Nor, in the Court of Appeals' view, could the Board alter these "parameters" without ex post facto implications. While "new Board members may carry new ideas regarding the exercise of [their] discretion, and old Board members may change their mind in the light of new considerations," they may not apply their "newly-found wisdom" to deny a prisoner's "preexisting right to parole consideration," any more than a legislature could later re-sentence that prisoner more severely. "This is precisely what the Ex Post Facto Clause prohibits." Pet. App. 47a.

The Court of Appeals then examined the Board's decisions on Mickens-Thomas' parole applications in light of the pre-1996 "parameters" it had identified. Pet. App. 34a-39a, 49a-54a. The Board argued that its decisions were legitimate exercises of the discretion conferred by the Parole Act, but the Court of Appeals disagreed. In the Court of Appeals' view, "under the Guidelines [Mickens-

]Thomas was entitled to parole," Pet. App. 48a; and the Board's departure from its Guidelines, based on "the nature of the underlying offense and the potential danger to the public if [Mickens-]Thomas were released," Pet. App. 50a, was not justified. "[T]he Board's denial of [Mickens-]Thomas' parole, despite its claims that the decision was the result of the discretion vested in it by the pre-1996 policies, exceeded any reasonable interpretation of th[ose] policies." Pet. App. 54a.

Rather, the Court of Appeals held that the Board's actions were the product of a "new parole policy of 1996," Pet. App. 40a, which in turn was rooted in the amendment to Section 331.1 of the Parole Act in December of that year. Pet. App. 40a-44a. The Court of Appeals found evidence of this "new policy" in the remarks of legislators, courts, and the Board itself, Pet. App. 43a-44a, 55a; and laid special emphasis on the Board's earlier actions in granting paroles to prisoners whose sentences had been commuted. Pet. App. 44a. Under this "new policy," the Board gave "foremost importance," Pet. App. 41a, to considerations of public safety, as opposed to other factors. Pet. App. 45a. As the Court of Appeals saw it, while "public safety had been a part of the Board's pre-1996 criteria, it had never been an exclusive, or even the most important, criterion." Pet. App. 53a-54a.

The Court of Appeals acknowledged the decision of the Supreme Court of Pennsylvania in *Winklespecht v. Pa. Bd. of Probation and Parole*, 571 Pa. 685, 813 A.2d 688 (2002), but accorded it no weight. *See* Pet. App. 54a-55a. In *Winklespecht*, the state Supreme Court had considered and rejected an ex post facto challenge, based on the amendment to Section 331.1 of the Parole Act, to the denial of parole. The Pennsylvania Supreme Court said:

> Although the language concerning "protect[ing] the safety of the public" and "assist[ing] in the fair administration of justice" was added to § 331.1 in 1996, these concepts are nothing new to the parole process and have always been underlying concerns. Both versions of § 331.1 leave the decision regarding the grant of parole within the discretion of the Board; the fact that some language was added in 1996, which clarified the policy underlying the parole process, does nothing that increases Winklespecht's punishment.

Winklespecht, 813 A.2d at 692 (plurality opinion). *Accord id.* at 693 (Castille, J., concurring); *id.* at 695-97 (Saylor, J., concurring and dissenting). The Court of Appeals, however, dismissed *Winklespecht* as of no significance because it "came too late to alter the Board's view of the statutory amendment on the outcome of this case." In the Court of Appeals' view, the Board — which had successfully argued for the interpretation of the statute adopted by the state Supreme Court in *Winklespecht* — was "uninfluenced" by that interpretation. *Ibid.*

Accordingly, the Court of Appeals held that the denial of Mickens-Thomas parole, on the basis of the "new policy of 1996," violated the Ex Post Facto Clause, and remanded for the Board to issue a new decision on his application within 45 days. In making this decision, the Board was to adhere to its pre-1996 policies, as described by the Court of Appeals:

> If the Guidelines recommend release, the Board should fairly consider the weight of this recommendation. A decision contrary to a Guidelines recommendation must be buttressed by unique factors which outweigh the Guidelines endorsement. Moreover, release on parole is a Board policy presumption, and parole should be granted unless

countervailing negative factors affirmatively outweigh reasons supporting release.

Pet. App. 59a.

The Court of Appeals denied rehearing and rehearing en banc, and likewise denied a motion to stay its mandate pending the filing of this petition. On May 23, 2003, the Board, pursuant to the mandate, issued its new decision on Mickens-Thomas' application, and again denied it. On June 4, 2003, Mickens-Thomas filed motions in the Court of Appeals, claiming that the Board's decision was not consistent with the Court of Appeals' judgment and asking for his immediate release from custody; those motions are pending as of the filing of this petition.

3. *Hollawell v. Gillis.* a. John Hollawell is serving a sentence of six and a half to twenty-three years for corrupt organization offenses, bribery and conspiracy. Pet. App. 3a. The Board denied his application for parole in July of 1999, on the ground that "the mandates to protect the public and to assist in the fair administration of justice cannot be achieved through your release on parole." Pet. App. 18a. After pursuing his state court remedies, he filed this habeas action in the District Court, claiming that the Board's action violated the Ex Post Facto Clause. Like Mickens-Thomas, Hollawell based his claim on the amendment to Section 331.1 of the Parole Act.

b. The District Court disagreed. The District Court recognized that the text of Section 331.1 had changed, Pet. App. 19a; but held that, considered within the context of "all of the statutory procedures relating to parole," *ibid*, this change in the statutory text had not worked a change in substance. The District Court relied for this holding on Section 21 of the Parole Act, which at

all relevant times has empowered the Board to parole convicts "whenever in its opinion ... it does not appear that the interests of the Commonwealth will be injured thereby." Pa. Stat. Ann., tit. 61, § 331.21, *quoted at* Pet. App. 21a. Thus, in the District Court's view,

> [a]lthough the old version of ... § 331.1 did not contain a directive that the Parole Board protect the public, protection of the public was always a factor the Parole Board was obliged to consider. ... Both before and after the 1996 amendment to § 331.1, the Parole Board was charged with protecting the public. The law in this respect did not change.

Pet. App. 20a-21a. The District Court accordingly denied Hollawell's petition.

c. The Court of Appeals reversed, relying entirely on its intervening decision in *Mickens-Thomas*.[16] *See* Pet. App. 12a. The factual record in *Hollawell* was far less extensive than that on which the *Mickens-Thomas* panel had relied. The *Mickens-Thomas* panel had before it the Board's entire file on Mickens-Thomas, Pet. App. 70a-71a, and the panel had relied heavily on its extensive review of the Board's decisions, worksheets and internal notes on his applications. *See* Pet. App. 34a-39a, 49a-54a. No such materials were available to the *Hollawell* panel. The *Mickens-Thomas* panel had likewise relied heavily on what it called the "staggering," Pet. App. 44a, *quoted at* Pet. App. 15a, statistical evidence on earlier grants of paroles to those with commuted life sentences.

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[16]By the time the Court of Appeals issued its decision in *Hollawell* on April 23, it had not only decided *Mickens-Thomas* (on February 21) but had also denied the petitioners' request for rehearing or rehearing en banc (on March 24).

These statistics had no bearing on Hollawell, who is not a commuted life prisoner.

Nevertheless, the Court of Appeals held that no further factual development was needed in light of the *Mickens-Thomas* decision, Pet. App. 15a-16a, which it read as broadly applicable: "*Mickens-Thomas* clearly holds as a legal matter that the Pennsylvania statute violates the *Ex Post Facto* Clause." Pet. App. 16a. The panel recognized that in *Winklespecht* the state Supreme Court had recently come to the opposite conclusion on the same issue. Pet. App. 15a ("We are aware of the recent decision of the Pennsylvania Supreme Court considering whether the statutory amendment violates the *Ex Post Facto* Clause....") The panel made no comment on *Winklespecht*, however, except to observe that it was bound by the decision in *Mickens-Thomas*.

REASONS FOR GRANTING THE WRIT

The Court of Appeals committed two distinct, although related, errors in these cases. First, it held that the "law" governing parole in Pennsylvania is embodied in the internal guidelines and practices of the Board, which cannot be changed without ex post facto implications. Building upon this first error, the Court of Appeals then erroneously concluded that the amendment to Section 331.1 had worked just such a change. Both of these holdings should be reviewed by the Court. The first conflicts with virtually all federal and state courts which have considered similar issues; while the second is at odds with the highest court of Pennsylvania on an issue which directly affects the administration of the Commonwealth's parole system.

I. The Court of Appeals' Holding, That the Board's Internal Policies Are "Laws" for Ex Post Facto Purposes, Conflicts with the Decisions of Most of the Courts Which Have Considered Similar Issues.

The internal policies of parole agencies come in a wide variety of forms: administrative regulations, guidelines, operating manuals, directives, memoranda, and so on. The proper analysis of these policies under the Ex Post Facto Clause, and in particular whether such policies are "laws" within the meaning of the Clause, presents an important and recurring issue which the Court has not addressed. The Courts of Appeals and state courts, however, have frequently confronted it, and have reached a fair degree of consensus. Most of these courts have concluded that policies which embody mandatory rules binding the parole agency — often because they have been formally adopted, through some prescribed procedure, as regulations — are "laws" which trigger the protections of the Ex Post Facto Clause when they are altered. *See, e.g., Akins v. Snow*, 922 F.2d 1558, 1561 (11th Cir. 1991) (Georgia regulations adopted pursuant to grant of quasi-legislative power are "laws" for ex post facto purposes), *overruled on other grounds, Garner v. Jones*, 529 U.S. 244 (2000).[17] Policies, however, which do *not* place binding constraints on a parole agency's discretion —policies which merely structure the exercise of agency discretion, or indicate how the agency intends to exercise its discretion — are not "laws" within the meaning of the Ex Post Facto Clause.

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[17]In *Garner*, the Court held that the Georgia regulations considered in *Akins* did not necessarily violate the Ex Post Facto Clause, because they did not necessarily create a "significant risk of increased punishment." 529 U.S. at 257.

Thus, the Courts of Appeals are unanimous in holding that the guidelines used by the United States Parole Commission are not "laws" for ex post facto purposes. *See, e.g., Prater v. U.S. Parole Comm'n*, 802 F.2d 948, 951 (7th Cir. 1986) (en banc) (collecting cases); *DiNapoli v. Northeast Regional Parole Comm'n*, 764 F.2d 143, 146-47(2d Cir. 1985) (collecting cases). The Parole Commission's guidelines, like the Pennsylvania Board's guidelines in this case, score prisoners along a series of variables designed to measure the severity of their crime and the risk of parole violation; the resulting score then produces a recommended disposition. Pet. App. 30a-31a; *see Warren v. U.S. Parole Comm'n*, 659 F.2d 183, 192-93 (D.C. Cir. 1981). The Parole Commission, however, like the Pennsylvania Board, remains free to depart from the guidelines when circumstances warrant, and it is this factor which the Courts of Appeals have found dispositive.[18] *Id.*, at 193. The Sixth Circuit explained:

> These guidelines are not law, but guideposts which assist the Parole Commission ... in exercising its discretion. Nor do these guidelines have the characteristics of law. They are not fixed and rigid, but are flexible. The Commission remains free to make parole decisions outside of these guidelines.

Ruip v. United States, 555 F.2d 1331, 1335 (6th Cir. 1977), *quoted in DiNapoli*, 764 F.2d at 146. *Accord Prater v. U.S. Parole Comm'n*, 802 F.2d at 954 (guidelines are

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[18]Only the Third Circuit initially resisted this analysis, *see U.S. ex rel. Forman v. McCall*, 709 F.2d 852 (3d Cir. 1983), but eventually even the Third Circuit conceded that the guidelines were administered so flexibly that they were not "laws" for ex post facto purposes. *See U.S. ex rel. Forman v. McCall*, 776 F.2d 1156, 1163 (3d Cir. 1985) (Commission decisions accorded with guidelines in only 75.4% of cases).

interpretive rather than legislative rules). Or, as the District of Columbia Circuit explained in *Warren*:

> The punishment prescribed for Warren was to be held after his minimum term at the mercy of parole authorities exercising their discretion as best they could. The mere fact that the Parole Commission's mercy is now channeled, structured and rationalized by a formal system of guidelines does not worsen Warren's position. He was sentenced to be held at their discretion. He is being held at their discretion.

Id., at 196. *Accord Portley v. Grossman*, 444 U.S. 1311 (1980) (Rehnquist, J., in chambers) (no ex post facto violation from a "change in guidelines assisting the Commission in the exercise of its discretion"). *Cf. Miller v. Florida*, 482 U.S. 423, 435 (1987) (distinguishing Florida's sentencing guidelines on the ground that, unlike the federal parole guidelines, they bind sentencing courts); *U.S. v. Seacott*, 15 F.3d 1380 (7th Cir. 1994) (federal sentencing guidelines are "laws" because, unlike the parole guidelines, they tightly control the discretion of the courts).

The courts have applied the same analysis, with the same results, to state parole policies. Thus, in *Griggs v. Maryland*, 263 F.3d 355 (4th Cir. 2001), the court rejected an ex post facto challenge to an announcement by the Governor that he would not approve parole to prisoners serving a life sentence unless they were very old or terminally ill. The Fourth Circuit relied in turn on *Lomax v. Warden, Maryland Correctional Training Center*, 356 Md. 569, 741 A.2d 476 (1999), which had rejected an identical challenge. The *Lomax* court recognized that a "law," for ex post facto purposes, may include some administrative regulations. *Id.*, at 577. Nevertheless, the ex post facto prohibition is "inapplicable to parole guidelines which do not have the force and effect of law

but are merely policies ... that show how ... discretion is likely to be exercised." *Ibid* (internal quotation marks omitted). In this case, the challenged policy was "simply an announcement of guidelines as to how the Governor would exercise the discretion which he has under the law. The Governor's announcement did not bind him, and he can employ different guidelines whenever he desires to do so." *Ibid.*

Still other courts have said the same. "The Ex Post Facto Clause does not apply to guidelines that do not create mandatory rules for release but are promulgated simply to guide the parole board in the exercise of its discretion. ... Such guidelines are not 'laws' within the meaning of the Ex Post Facto Clause." *Barna v. Travis*, 239 F.3d 169, 171 (2d Cir. 2001) (policy of denying parole to prisoners convicted of crimes of violence did not implicate ex post facto protections). *Accord Shabazz v. Gabry*, 123 F.3d 909, 915 & n.12 (6th Cir. 1997) (properly promulgated Michigan administrative regulation was "law" for ex post facto purposes, but internal memoranda and policy directives were not); *Blair-Bey v. Quick*, 151 F.3d 1036 (D.C. Cir. 1998) (guidelines which merely codified agency practice, and which agency was free to ignore, not "laws"). *Cf. Flemming v. Oregon Bd. of Parole*, 998 F.2d 721 (9th Cir. 1993) (Oregon regulations, which under state law had the force and effect of law, are "laws"); *Gwong v. Singletary*, 683 So.2d 109 (Fla. 1996) (same, Florida regulations); *Stansbury v. Hannigan*, 265 Kan. 404, 960 P.2d 227 (1998) (same, Kansas regulations).

In these cases, by contrast, the Third Circuit paid no attention to whether the Board's Guidelines have any mandatory or binding character under Pennsylvania

law[19]; indeed, the Third Circuit offered no support at all for its assertion that the Guidelines "govern [the Board's] discretion." Pet. App. 46a. *Cf., e.g., Miller v. Florida*, 482 U.S. at 435 (looking to Florida law to establish binding character of state sentencing guidelines). In addition, the Third Circuit, unlike other courts, brushed aside evidence that the guidelines do not, on their face, purport to supplant the exercise of Board discretion[20]; and, unlike other courts, brushed aside evidence that, in practice, the Board departs from its guidelines in a substantial percentage of cases. *See* Pet. App. 31a (about 20% of cases decided contrary to Guidelines).

The Third Circuit's decisions in these cases thus cannot be reconciled with the body of law just described. The Court should therefore review these cases to resolve this conflict.

II. The Court of Appeals' Decision Conflicts with Decisions of the Supreme Court of Pennsylvania, on a Matter Directly Affecting the Administration of Pennsylvania's Parole System.

The Court of Appeals' decision likewise brings it into conflict, on several levels, with the highest court of Pennsylvania. First, the Court of Appeals' assertion — which it made no effort to support — that the Board's Guidelines constitute binding rules which "govern its discretion," Pet. App. 46a, conflicts with well-settled principles of Pennsylvania administrative law.

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[19]As we suggested above, *supra* at 4-6, and discuss in more detail below, they do not.

[20]"[T]he structuring of discretion does not eliminate it; the burden of decision remains with the decision maker to evaluate the merits of each case." Pet. App. 31a, *quoting* Board's "Statement on Policy, Procedure and Philosophy."

As we explained above, *supra* at 4, Pennsylvania administrative regulations which are adopted in accordance with the statutory notice-and-comment process have the force of law and create controlling standards of conduct which bind the adopting agency. *E.g., Borough of Pottstown v. Pennsylvania Municipal Retirement Bd.*, 551 Pa. 605, 609-10, 712 A.2d 741, 743 (1998); *see Sourbeer v. Robinson*, 791 F.2d 1094, 1097 n.1, 1100-01 & n.4. (3d Cir. 1986). Thus, for example, the Board's regulations at Pa.Code, tit. 37, § 75.3 (presumptive backtime ranges for parole violators) govern the Board's own decision-making. *See, e.g., Corley v. Bd. of Probation and Parole*, 478 A.2d 146, 148 (Pa.Cmwlth. 1984) (Board must justify departure from presumptive backtime range).

Agency directives which are not adopted through this process, however, lack legal force. They are either invalid regulations which should have been promulgated in accordance with the statutory process, *see, e.g., Lopata v. Pa. Unemployment Compensation Review Bd.*, 507 Pa. at 575-76; or, like the Board's Guidelines, they are mere statements of agency policy which need not be so adopted. *See, e.g., Pa. Human Relations Comm'n v. Norristown Area Sch. Dist.*, 473 Pa. 334, 346-51, 374 A.2d 671, 677-80 (1977). Such statements "do[] not establish a binding norm upon that agency," but simply "announce the agency's provisional intentions for the future." *Eighty-Four Mining Co. v. Three Rivers Rehabilitation, Inc.*, 554 Pa. 443, 453, 721 A.2d 1061, 1066 (1999). The Court of Appeals' claim that the Board's Guidelines "govern its discretion," cannot be squared with these principles.

Second, the Court of Appeals' resulting vision of Pennsylvania's parole system, in which the Board's discretion is narrowly cabined within the "parameters" identified by the Court of Appeals, *see, e.g.*, Pet. App. 47a

("some discretion *might* still exist within the[se] parameters," emphasis added), is completely at odds with the scheme of unfettered discretion established by the Parole Act and confirmed in decision after decision by the Pennsylvania Supreme Court. *See, e.g., Coady v. Vaughn*, 564 Pa. at 608, 770 A.2d at 290; *Rogers v. Bd. of Probation and Parole*, 555 Pa. at 288 n.2, 724 A.2d at 321 n.2; *Commonwealth ex. rel. Sparks v. Russell*, 403 Pa. 320, 169 A.2d 884 (1961).

Finally, and most acutely, the Court of Appeals' decision in these cases conflicts with the Pennsylvania Supreme Court's decision in *Winklespecht v. Bd. of Probation and Parole, supra*, as well as with the Pennsylvania Commonwealth Court's earlier decision in *Reynolds v. Bd. of Probation and Parole*, 809 A.2d 426 (Pa.Cmwlth. 2002). Simply put, in *Winklespect* and *Reynolds* the Pennsylvania courts held that the amendment to Section 331.1 does not violate the Ex Post Facto Clause, and in *Mickens-Thomas* and *Hollawell* the Court of Appeals held that it does. Pet. App. 15a-16a.

Thus, the Court of Appeals sees a Board hedged about with "parameters" which were suddenly altered, while the Pennsylvania courts see a Board exercising unfettered discretion both before and after the amendment to Section 331.1. *Winklespecht*, 813 A.2d at 692 ("Both versions of § 331.1 leave the grant of parole within the discretion of the Board"). The courts of Pennsylvania see a parole system in which protecting the safety of the public is and always has been "an underlying concern," *Winklespecht*, 813 A.2d at 692 (plurality opinion), while the Court of Appeals envisions a parole regime in which "concern for potential risks to public safety could not be the sole or dominant basis for parole denial," Pet. App.

45a — a regime which not only conflicts with *Winklespecht* but is downright bizarre.[21]

These holdings are not compatible, and their incompatibility flows directly from the Court of Appeals' disregard for Pennsylvania law discussed above. It is obviously unsatisfactory to have the Court of Appeals at loggerheads with Pennsylvania's highest court on an issue which is not only thoroughly entwined with issues of state law, but which also directly affects the administration of the Commonwealth's criminal justice system. Pennsylvania must therefore ask the Court to resolve this impasse.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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[21] *See Prater v. U.S. Parole Comm'n*, 802 F.2d at 950 (dismissing the "weird possibility" that a "responsible parole commission could take the position that while releasing the prisoner would be incompatible with the welfare of society, he should be released anyway").

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